No. 82-2146

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In The

Supreme Court of the United States

October Term, 1982

MASHPEE TRIBE,

Petitioner,

vs.

NEW SEABURY CORP., ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Did the First Circuit deny judicial due process by summarily ordering its Clerk, without reasoned opinion, to return without filing Indian petitioner's motion that the court exercise its inherent corrective power to vacate its 1979 judgment and enter substitute judgment *nunc pro tunc*, said motion presented on three documented *prima facie* grounds:

1. During the 1979 proceeding, petitioner's then chief counsel had not brought either to the District or Circuit Court's attention that petitioner had been a matter of law, non-terminated, politically recognized federal tribe at least since 1789, such political recognition bound the court, and petitioner's continuous federal wardship and federal standing to sue as a special juristic person was a required consequence;

2. Accordingly, the Circuit Court's affirmance of a judgment of dismissal by the District Court based on a negative jury finding on the legal question of petitioner's tribal existence and consequent lack of "standing to sue", was void as a matter of law;

3. Any doubt about correcting this procedural aberration, should be resolved in favor of petitioner as a federally protected political community and ward of this Court?

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No.

In The

Supreme Court of the United States

October Term, 1982

MASHPEE TRIBE,

Petitioner,

vs.

NEW SEABURY CORP., *et al.*,*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Mashpee Tribe prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the First Circuit entered in this case on February 1, 1983.

ORDER BELOW

The order of the United States Court of Appeals for the First Circuit is docketed as Nos. 78-1272, 1273 and 274, *Mashpee Tribe*

* *See* List of Parties, Appendix D, 5a.

v. New Seabury Corp. et al., and is printed as Appendix A to this petition (1a).

JURISDICTION

The order of the United States Court of Appeals for the First Circuit was entered on February 1, 1983. By order dated May 23, 1983, Mr. Justice Brennan extended the time for filing this petition to and including July 1, 1983. This petition was filed within the extended time. This Court has jurisdiction under 28 U.S.C. §§1254(1) and 2106, and under Rule 17(a), U.S.S.C.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall. . . be deprived of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

The proceeding which prompted this petition was petitioner's motion with written requested hearing, that invoking its inherent corrective power, the First Circuit vacate its 1979 judgment, *Mashpee Tribe v. New Seabury Corp.*, 592 F. 2d 575 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1980) (*Mashpee I*), and enter a substitute judgment *nunc pro tunc* on fully documented *prima facie* grounds that said judgment was void as a matter of law (*see* Plaintiff-Appellant's Motion to Vacate Judgment and to Enter Substitute Judgment Nunc Pro Tunc which is included in papers to be handed up to the Court upon filing this petition).

This petition seeks review of the Circuit Court's order that the papers be returned without filing (2a).

The gist of petitioner's motion to the Circuit Court was that its original chief counsel, who had agreed petitioner's tribal standing to bring its 1976 Indian land complaint alleging Non-intercourse Act violation be submitted to a jury, had not brought either to the trial court's or the Circuit Court's attention, that petitioner "had been politically recognized" — "has never been federally terminated" — "uses and occupies a land reserve officially recognized and designated as to location and acreage" — that "under the political question doctrine the District Court was without power to look behind plaintiff's non-terminated federal recognition". Accordingly, petitioner believes the District Court's 1978 judgment "that this action be dismissed on the merits, the plaintiff not having established its standing to bring suit as an Indian tribe" is void as a matter of law and the Circuit Court's 1979 affirmance of such void judgment not only did not validate it but is itself void (*see* Appendix B—Plaintiff-Appellant's Motion).

Attached to petitioner's motion were photocopies of pertinent United States executive and legislative departmental records over

a period of years inventorying and listing petitioner as an Indian tribe of the United States living on its reservation (*see* Attachments "A", "B", "C", "D" and "F" which are included in papers to be handed up to the Court upon filing this petition). Also attached was a current (1982) admission by the United States Justice Department "that the United States has never terminated the Mashpee Tribe, their community or their Reservation. . . . * (Attachment "E").

In addition, petitioner incorporated a memorandum of law supporting the court's inherent power to grant relief in cases of manifest error such as void judgments. The memorandum further emphasized the binding effect of political recognition of Indian tribes on the courts, the political question doctrine, and the exclusive federal power to terminate an Indian tribe and its reservation, as well as other relevant propositions (Attachment "G").

Four days after petitioner filed its motion, the Circuit Court entered a six line order without reasoned opinion directing its clerk "to return the tendered papers without filing" (2a).

REASONS FOR GRANTING THE WRIT

The First Circuit's cryptic six line order preventing petitioner from even filing its motion denies petitioner fundamental judicial fairness.

In the opinion of petitioner's present counsel, neither the 1978 District Court hearing nor the 1979 Circuit Court review got into the root law that controls *Mashpee I.* Petitioner's then

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* *See also,* portion of Earle Report in which Massachusetts acknowledges the continuing existence of several Indian tribes, including the Mashpee and their reservation, and which petitioner had proposed to offer in toto at the hearing on its motion. The Mashpee portion of this report without census tables is included in Appendix C of documents to be handed up at filing.

chief counsel, after stipulating that petitioner's standing to sue, that is, its tribal existence, was the threshold question, agreed this legal issue be treated as a question of fact. In addition, he let the chief defense counsel, an experienced trial lawyer, lead him into submitting this legal question to a jury:

> "MR. ST.CLAIR: . . . The fact that there was a jury on this issue is an interesting fact. My memory is very clear, there was no objection to the jury, because, as I well remember, we had fully briefed that question and were somewhat surprised that there was no opposition to the claim of jury." *Recusal Hearing*, CA Nos. 81-3205-S through 81-3209-S, 2 February 1982, Tr. 57.

So for the first time in nearly 200 years of federal Indian law, tribal existence, a legal question, was submitted to a lay non-Indian jury. That the jury was hopelessly confused is underscored by their finding petitioner was not a tribe in 1790, 1869, 1870 and 1976, but was a tribe in 1834 and 1842.

But the root issues controlling the legal existence of petitioner's tribe and reservation: sovereign succession — exclusive federal control — federal recognition — federal termination — political question — separation of powers; all matters of law vital to petitioner's situation, were never even recognized or brought up, let alone put to adversary test or judicial consideration.

As petitioner pointed out in its motion to the First Circuit —

Sovereign recognition of Indian tribes and their reservations can be inherited from a prior sovereign or come about by treaty or report or other official executive or legislative act of the current sovereign.

In petitioner's case, its federal recognition comes not only by inheritance from its prior sovereigns, the Massachusetts Commonwealth and the English Crown, but by inclusion in various tribal inventories, censuses and lists prepared and maintained by the executive and legislative departments of the United States (Attachments "A", "B", "C", "D" of Appendix B).

A leading Court of Claims case underscores the legal effect:

> "(I)f such . . . tribes . . . have not been recognized by treaty, but have been (recognized) by the officers of the Government whose duty it was to report in respect thereto, then the court will accept that as sufficient recognition of the tribe . . . on which to predicate a judgment." *Tully v. United States,* 32 Ct. Cl. 1, 7-8 (1896).

And it is well established the court is bound by such political recognition.

In international affairs, for example, once the executive or legislative — the political — departments of the United States have recognized a foreign sovereign, its courts are bound to do the same. *Oetjen v. Central Leather Co.,* 246 U.S. 297, 301-303 (1918).

And so in Indian affairs, federal political recognition of an Indian tribe binds the courts. *United States v. Holliday,* 70 U.S. (3 Wall) 407, 419 (1866).

And such recognition continues until expressly terminated by Congress. Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims,* 31 Me. L. Rev. 17, 67-68 and n. 262 (1979).

In short, petitioner's present counsel believes *Mashpee I* not only was a procedural aberration but is null and void. The matter of law merits of petitioner's tribal existence and standing to sue were never presented or considered.

Obviously, petitioner believes its tribe is a viable legal entity and its land reserve is federal sovereign trust territory. And petitioner knows its reservation is its primary tribal asset. But deeper still, petitioner knows its tribe is made up of human beings whose reservation is their homeland.

So for petitioner's people to helplessly stand by, as non-Indian land speculators and developers, under color of void Massachusetts legislation, take over more and more of their homeland, and for petitioner's people to see the racial incidents increasing and getting nastier, and for petitioner's people to see their trees cut down — their land bulldozed — the headwaters of their principal river built on — their wildlife driven away — their fishing grounds confiscated — their beaches taken over — all for large profits and summer playgrounds and sprawling condominiums and hot-topped shopping plazas, rends the hearts and souls of these members of a special minority who with their homeland are under the promised protection of the federal government and the federal courts.

But aside from these most compelling human considerations, it seems in petitioner's situation the First Circuit disregards its own rigorous standards for fundamental judicial fairness.

For example —

In a recent case, the court chastized a district judge who summarily and without formal hearing denied an attorney's request for fee award:

> "(T)he summary disposition of the threshold question of entitlement in an informal unrecorded settlement conference followed by issuance of an order denying counsel fees *without an adequate statement of the reasons* for the order *does not meet minimum standards of procedural fairness and regularity*. . . . Nor does an order issued *without a deliberate articulation of its rationale,* including some appraisal of the factors underlying the court's decision, *allow for a disciplined and informed review* of the court's decision." *Sargeant v. Sharp,* 579 F. 2d 645, 647 (1st Cir. 1978) (emphasis added).

And of course, this Supreme Court itself asserts that the right to a full and fair opportunity to litigate an issue is protected by the due process clause of the United States Constitution. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 329 (1971). In fact this Court sets the highest standard for fundamental judicial fairness:

> "Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115, 124 (1956).

Most certainly, if the First Circuit feels the district judge must meet this standard, the circuit judges themselves should do no less.

SUMMARY

Quite simply, petitioner believes its rejected motion presented a strong *prima facie* case.

While the First Circuit may feel the non-Indian community in Massachusetts is better served by keeping a lid on the local Indian situation, and while the respondents may consider the Indians non persons, the legal fact remains that petitioner is one of six tribes in Massachusetts that the United States Justice Department admits have not been terminated. And the further legal fact remains that petitioner's homeland is one of the six land reserves over which the First Circuit admits Massachusetts has had no sovereignty since 1789. *Epps v. Andrus,* 611 F. 2d 915, 916 (1st Cir. 1979), *citing Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974). *Just because the local consequences of these facts may be deeply disquieting is not sufficient reason to deny petitioner hearing or remedy.*

Accordingly, petitioner believes the procedural aberration of *Mashpee I* coupled with the callous invasion of pertitioner's homeland and the gross disregard for petitioner's protected status provide the special circumstances and the strong federal interest waranting recall of mandate. *See, Greater Boston Television Corp. v. FCC,* 463 F. 2d 268 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); *American Iron and Steel Institute v. EPA,* 560 F. 2d 589 (3rd Cir. 1977), *cert. denied,* 435 U.S. 914 (1978).

So if petitioner is a politically recognized non-terminated federal tribe — if petitioner's reservation is federal sovereign trust land — if petitioner's people are wards of the United States and of this Court — if petitioner is entitled to control its homeland — if petitioner does have the benefit of all relevant doubts — if the quality of legal representation and handling of Mashpee I is questionable — if the Mashpee I judgment is void — then

most certainly these are the propositions which should now control Mashpee I. For by federal measure, neither the propositions are new nor their consequences new. So to deny their effect in Massachusetts not only would deny petitioner and its people fundamental fairness as one of our nation's Indian communities, but make a local mockery of carefully-fashioned rules and policies of more than 200 years of federal Indian law.

CONCLUSION

Petitioner submits it should be allowed to file its motion and be accorded full briefing, formal argument (possibly, *en banc*), and reasoned opinion. Under the circumstances, this Court may feel it more appropriate to treat instant pleading as a petition for mandamus, but in whatever form the Court chooses, petitioner would deeply appreciate the relief it seeks.

Respectfully submitted,

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Of Counsel

APPENDIX A — ORDER OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1272

MASHPEE TRIBE,

Plaintiff-Appellant,

v.

NEW SEABURY CORP., ET AL.,

Defendants-Appellees.

No. 78-1273

MASHPEE TRIBE,

Plaintiff-Appellee,

v.

NEW SEABURY CORP., ET AL.,

Defendants-Appellants.

No. 78-1274

MASHPEE TRIBE,

Plaintiff-Appellee,

Appendix A

v.

NEW SEABURY CORP., ET AL.,

Defendants-Appellees.

MATTHEW B. CONNOLLY, ETC.,

Defendant-Appellant.

Before COFFIN, Chief Judge,
BOWNES and BREYER, Circuit Judges.

ORDER OF COURT

Entered February 1, 1983

Having reviewed appellant's tendered Motion to Vacated Judgment and to Enter Substitute Judgment Nunc Pro Tunc, and the tendered memorandum in support thereof, and seeing no justification for recalling mandate and reconsidering these cases,

The Clerk is directed to return the tendered papers to counsel without filing.

By the Court:

s/ Dana H. Gallup
Clerk.

(cc: Messrs. Hahn, McElaney, Rollins, St. Clair, Otis, Van Gestel, Mone, and Tureen.)

APPENDIX B

PLAINTIFF-APPELLANT'S MOTION TO VACATE JUDGMENT AND TO ENTER SUBSTITUTE JUDGMENT NUNC PRO TUNC

ATTACHMENT "A" (MORSE REPORT)

ATTACHMENT "B" (McKENNY REPORT)

ATTACHMENT "C" (CONGRESSIONAL REPORT)

ATTACHMENT "D" (SCHOOLCRAFT REPORT)

ATTACHMENT "E" (FEDERAL ANSWER)

ATTACHMENT "G" (PLAINTIFF'S MEMORANDUM OF LAW)

(Printing of these documents are omitted here but will be submitted to the Court upon filing.)

APPENDIX C

PROFFERED ATTACHMENT "F" (EARLE REPORT)

(Printing of these documents are omitted here but will be submitted to the Court upon filing.)

APPENDIX D — LIST OF PARTIES

MASHPEE TRIBE,

PLAINTIFF,

v.

NEW SEABURY CORP., TODD B. ACKERMAN, JILL ACKERMAN, JUNE CHILDS, DAVID N. ALS, ANN V. ALS, ALBERT O. ANDERSON, HAZELBELLE ANDERSON, ADOLPH E. BECKER, DOROTHY L. BECKER, LESLIE E. BECKER, PEYTONIA J. BECKER, NELLIE F. SLATON, WILLIAM H. SLATON, MANUEL BECKWITH, HERBERT P. BICKERSTAFFE, FLORENCE BICKERSTAFFE, DONALD B. BLAKEMAN, NANCY BLAKEMAN, MARVIN BLANK, individually and as trustee, HAROLD PERKINS, individually and as trustee, ROBERT D. BREIVOGEL, MARY L. BREIVOGEL, BRIARWOOD-MASHPEE ASSOCIATION, INC., COLTON H. BRIDGES, Director of the Division of Fisheries and Wildlife of the Commonwealth of Massachusetts, WILLIAM H. BRINE, JR., individually and as trustee, THOMAS L. COUGHLIN, JOHN H. BROOKS, JR., BRYNWOOD ASSOCIATES, INC., KARL AND PASQUALORE, INC., JEAN P. CANNING, CAPE COD 4-H CAMP CORP., JOHN P. CONDON CORP., WILLIAM G. CORY, LOUIS VOSE, WILLIAM E. CROWELL, JR., individually and as trustee, MELVIN J. DANGEL, ROBERT B. DAYS III, individually and as trustee, RICHARD M. DAYS, individually and as trustee, MICHICO DAYS, CURTIS E. DORRIE, JR., CONSTANCE B. DORRIE, JOHN A. DREW, FALMOUTH ROD AND GUN CLUB, INC., FIELDS POINT MANUFACTURING CORP., CAROL R. GOLDBERG, HERBERT GORFINKLE, individually

and as trustee, FRIEDA GORFINKLE, individually and as trustee, SIDNEY R. RABB, ESTHER V. RABB, GREAT RIVER CORP., GREENWOOD DEVELOPMENT CORP., WILLIAM A. HARRIS, individually and as trustee, IRENE C. HARRIS, OLIN C. HENDRIX, J.R.U. REALTY, INC., EUNICE JONES, CAROL B. JONES, MARTHA E. JONES, CLARA CURRIER, PHYLLISS M. JORDON, CAROL A. KONNER, L & L ASSOCIATES, INC., HENRY C. LABUTE, individually and as trustee, ADELE F. LABUTE, HERBERT LEMELMAN, individually and as trustee, ROBERT E. LENK, MALCOLM E. MACDONALD, individually and as trustee, PATRICIA R. MACDONALD, EARLE M. MARSTERS, individually and as trustee, WILLIAM J. MARSTERS, individually and as trustee, MARY L. MARSTERS, JAMES A. MCDONALD, JR., ROBERT R. MCNUTT, JR., GRACE C. MCNUTT, MITCHELL ENTERPRISES, INC., DOROTHY F. MORZE, individually and as trustee, NEW BEDFORD GAS & EDISON LIGHT CO., NEW SEABURY CONVEYANCING CO., INC., CLARENCE H. NEWTON, WILLIAM E. NEWTON, GEORGE H. LEBHERZ, JR., OCKWAY BAY DEVELOPMENT CORP., A.B.C. DRYWALL CO., INC., ELISE M. OTIS, ELIZABETH A. NILSSON, JEAN A. BRADLEY, ADELINE OWENS, LEONARD W. PECK, MARGARET S. PECK, DONALD H. PRIESTLY, individually and as trustee, PAUL A. LIPPER, individually and as trustee, GEORGE E. PRIESTON, REDBROOK CORP., E. ARTHUR ROBINSON, individually and as trustee, RALPH G. ANGUS, individually and as trustee, FLORENCE H. RYDER, VIRGINIA RYDER, MALCOLM E. RYDER, CARLETON H. COLLINS, MARION H. COLLINS, ROBERT B. SANTOS, LOUIS SANTOS, JR., BENVINDA G. LEIGHTON, AURORA G. GRACA, FIRST NATIONAL BANK OF BOSTON, co-executor of the estate of Frank F. Savage, DONALD T. DEVINE, co-executor of the estate of Frank F. Savage, SEA-LAKE CORP., JOHN F. SHIELDS, JOHN B. COTTON, WILLARD C. WEANER, THOMAS M. SHIELDS,

MARY JANE SHOOP, HAROLD H. SLATE, HERBERT FLASHMAN, JAMES H. SMITH, NORMAN EPSTEIN, FRANCIS A. SOUTHWICK, individually and as trustee, WILLIAM W. SPRAGGS, VENICE T. SPRAGGS, JOHN C. STERGE, individually and as trustee, KALY T. STRATIS, individually and as trustee, GEORGE H. THOMPSON, PHYLLIS P. THOMPSON, TOWN OF MASHPEE, THE TRUSTEES OF RESERVATIONS, ANTHONY P. UMINA, individually and as trustee, JOHN R. UMINA, HARRY SHUMAN, individually and as trustee, JACOB KAGAN, individually and as trustee, THOMAS K. WARNER, individually and as trustee, NORMAN F. BARRETT, JR., individually and as trustee, JOHN G. MCMANUS, individually and as trustee, EDWARD R. WASIL, individually and as trustee, HELEANA M. WASIL, individually and as trustee, STANLEY J. WASIL, THERESA A. WASIL, PEMBERTON WHITCOMB, RUSSELL MAKEPEACE, MAURICE MAKEPEACE, WILLIAM M. ATWOOD, THOMAS OTIS, GEORGE A. WINSLOW, individually and as trustee, RUTH S. WINSLOW, individually and as trustee, STEVE ZAGLAKAS, JEAN E. MANOOG,

DEFENDANTS*

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* NOTE: This case was certified as a defendant class action, with Mr. St. Clair designated lead counsel.